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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment to the Commission's Rules)
Regarding a Plan for Sharing)
the Costs of Microwave Relocation)

WT Docket No. 95-157
RM-8643

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COMMENTS OF INTERCEL, INC.

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InterCel, Inc. ("InterCel"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its comments in the above-referenced proceeding. InterCel is the managing partner of Powertel PCS Partners, L.P. ("Powertel"), a broadband PCS licensee, and, therefore, is an interested party in this proceeding. InterCel generally supports the Commission's proposal for sharing the costs of relocating microwave facilities currently operating in the 1850 to 1990 MHZ band and adopting parameters which define "good faith" negotiations during the mandatory negotiation period. By its comments, however, InterCel requests that the Commission adopt broad parameters for negotiation during the voluntary negotiation period and broadly define "good faith" during the voluntary negotiation period, including a duty to participate in negotiations if requested to do so by another party. Adopting such procedures for the voluntary period would facilitate the prompt and efficient operation of the relocation process, while also speeding the deployment of PCS. In support thereof, the following is shown:

The Commission first announced its timetable for relocating microwave incumbents in the 1850-1990 MHZ band in 1993.^{1/} In its Third Report and Order, the Commission considered the

^{1/} Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket 92-2, Third Report and Order and Memorandum

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needs of microwave incumbents and PCS licensees to conclude that a two-year voluntary negotiation period and a one-year mandatory negotiation period provided a reasonable balance between the parties' respective needs.^{2/} In defining the parameters of the voluntary negotiation period, the Commission stated that while "the parties are encouraged to negotiate and reach agreement on relocation, [they] are not required to do so."^{3/} The Commission later elaborated that microwave incumbents are not even required to meet with PCS licensees during the voluntary negotiation period.^{4/} Therefore, as the current rules stand, microwave incumbents have until April of 1997 before they even have to begin preliminary discussions with PCS licensees regarding relocation.^{5/}

In addition to permitting microwave incumbents' to remain mute during the voluntary period, the Commission has eliminated any independent incentive for microwave incumbents to negotiate with PCS licensees during the voluntary period. In the Third Report and Order, the Commission had agreed to grant tax certificates to microwave incumbents entering agreements during the voluntary period to "further [its] policy of encouraging voluntary agreements ... during the fixed two year

Opinion and Order, 8 FCC Rcd 6589 (1993) [hereinafter "Third Report and Order"].

^{2/} Third Report and Order ¶ 16. Public safety licensees are afforded greater voluntary and mandatory negotiation periods. InterCel's comments apply equally to the microwave incumbent and public safety voluntary negotiation periods.

^{3/} Id. ¶ 16.

^{4/} Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket 95-157, Notice of Proposed Rulemaking, FCC 95-426, released October 13, 1995, ¶ 6 [hereinafter "NPRM"].

^{5/} The two-year voluntary negotiation period expires April 4, 1997. Public Notice, DA 95-872, released April 19, 1995.

period” and to facilitate those agreements.”^{6/} The Commission, however, later extended the availability of tax certificates to microwave incumbents relocated through the mandatory negotiation period,^{7/} thereby negating any added benefit to incumbents relocating during the voluntary period. This change, or removal of incentive, was not enacted until after the close of the “A” and “B” block PCS customer.

Throughout this proceeding, the Commission has emphasized its interest in the rapid deployment of PCS.^{8/} This NPRM was issued, in part, in furtherance of that interest.^{9/} This interest is inconsistent with rules which fail to provide any incentive for relocation during the voluntary period and which fail to even require participation in negotiations during the voluntary period. The Commission has indicated that prompt relocation benefits both microwave incumbents and PCS licensees,^{10/} but the only way prompt relocation can be achieved is through participation in negotiations during the voluntary period. To facilitate prompt relocation, InterCel advocates broadly defining parameters for negotiation during the voluntary negotiation period but requiring “good

^{6/} Third Report and Order ¶ 42.

^{7/} Public Notice, DA 95-1659, released August 3, 1995.

^{8/} See, e.g., Third Report and Order ¶ 36 (“Our goal is to facilitate rapid implementation of new services in the emerging technology bands.”); id. ¶ 14 (“Undue delay would be inconsistent with the public interest in fostering and implementing new services that utilize emerging technologies as quickly as possible.”).

^{9/} “We believe that adoption of a mandatory cost-sharing plan would significantly enhance the speed of relocation by reducing the “free rider” problem and creating incentives for PCS licensees to negotiate system-wide relocation agreements with microwave incumbents. This would in turn result in faster deployment of PCS and delivery of service to the public.” NPRM ¶ 24.

^{10/} Id.

faith” negotiation during this period; it should be the precise contents of the negotiations which are voluntary and not the duty to negotiate at all. Specifically, InterCel supports defining “good faith” negotiations during the voluntary period as participating in negotiations if either party so requests with a party’s refusal to participate in meaningful negotiations with the other party during the voluntary period creating a rebuttable presumption that the refusing party is not acting in good faith. Adoption of this “good faith” definition would positively impact the relocation process by promoting communication between the parties and affording them greater time in which to formulate a mutually agreeable relocation plan before invocation of involuntary relocation.

With respect to the “content” of the negotiations, even during the voluntary negotiation period, the Commission should adopt broad guidelines which further the interests which it has sought so hard to balance; speeding the availability of new PCS service to the public while ensuring that incumbent microwave users are not disadvantaged by the relocation process. Conversely, it was never the Commission’s intent to bestow a “windfall” profit on the incumbents because of their license to use the public spectrum for their internal business needs. The public interest is clearly not served by, in essence, allowing incumbent microwave licensees to hold a second “PCS Auction” for their private gain. While there is certainly nothing wrong with an incumbent user seeking to recover its actual costs attributable to the relocation of its facilities, including the increased costs attributable to the disruption and inconvenience associated with relocating expeditiously, seeking the wholesale upgrade of an entire system as the basis for agreeing to the relocation of a single interfering path, flies in the face of the intent behind the Commission’s Rules. Incumbent licensees should be made truly whole for relying on the terms of their FCC licenses, not reap a “windfall” as custodians of the public spectrum.

InterCel's proposed definition of "good faith" during the voluntary period does not adversely affect or disadvantage any party in the relocation process. In fact, bringing parties to the negotiation table during the voluntary period provides the parties with greater time and flexibility to develop a relocation plan that is mutually beneficial to everyone concerned, and also serves the public interest by speeding deployment of PCS. The Commission's relocation process can only be successful if the parties negotiate with each other. No bona fide interest is served by allowing an incumbent microwave user (who must eventually relocate its facilities) to simply stone-wall a PCS licensee.

Finally, InterCel proposes that the FCC return to its original proposal to limit the availability of tax certificates to those incumbents who agree to the relocation of their facilities during the voluntary negotiation period. This added incentive "rewards those incumbent carriers who act to speed the availability of PCS service to the public." Moreover, the availability of tax certificates only to those relocated during the voluntary period, was factored into the bidding and license evaluation process models used by companies such as InterCel, to assess the cost and the likelihood associated with microwave relocation during the A and B PCS auctions. To subsequently remove that "incentive", invalidates the assumption upon which the auction participants relied in bidding billions of dollars for these licenses.

InterCel's proposal is not a significant departure from current policy regarding the relocation process. InterCel respects the Commission's desire not reopen this entire proceeding.^{11/} In light of the House of Representatives' recent proposal to reduce the voluntary negotiation period from two

^{11/} NPRM ¶ 3.

years to one year, there are some perceived shortcomings with the voluntary negotiation period.^{12/} The Commission has specifically articulated the possibility of revisiting the voluntary negotiation process.^{13/} To revisit the voluntary negotiation process in the manner InterCel has proposed herein does not change the character of the voluntary period, thwart the Commission's intent, or in any way disadvantage, the incumbent licensee seeking to be made whole. That it precludes an individual incumbent licensee from unjustly enriching itself as a custodian of a public asset, is not contrary to any concept of fair play or equity. Rather, InterCel merely seeks to reconcile the Commission's interest in promoting the rapid implementation of PCS with its rules for the voluntary negotiation period. The Commission recognizes that where both parties are dealing with each other in "good faith" the most efficient relocation will result from negotiation between the parties, not invocation of involuntary relocation. InterCel's proposal heightens the effectiveness of the voluntary period by encouraging negotiation between the parties, thereby increasing the likelihood of reaching agreements for efficient relocation. In addition, the sooner agreements can be reached, the sooner the Commission's interest in promoting the rapid deployment of emerging technologies can be served.

Conclusion

InterCel respectfully requests the Commission to adopt a definition of "good faith" for the voluntary negotiation period which obliges parties to participate in negotiations if requested to do

^{12/} NPRM ¶ 3 (citing Recommendations of the House Committee on Commerce Pursuant to the Concurrent Resolution on the Budget for Fiscal Year 1996 (agreed to by voice vote on September 13, 1995)).

^{13/} Third Report and Order ¶ 18.

so and establishing broad "guidelines" for negotiating during that period. Moreover, InterCel submits that a return to the limited availability of tax certificates to incumbents who relocate during the voluntary period is consistent with the terms and conditions upon which the PCS auction participants determined the value upon which they would bid for these licenses. InterCel's proposal would serve the public interest by facilitating prompt and efficient relocation while also speeding deployment of PCS, while keeping incumbent licensee's whole.

Respectfully Submitted,

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